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5 *Dominion Virginia Power*

6 **UNITED STATES BANKRUPTCY COURT**
7 **CENTRAL DISTRICT OF CALIFORNIA**
8 **LOS ANGELES DIVISION**

8 In re:) CASE NO. 13-bk-27689-WB
9)
9 COLOREP, INC.,) CHAPTER 11
10 a California corporation, *et al.*,)
11 Debtors,) (Jointly Administered)
12) **REPLY OF VIRGINIA ELECTRIC AND**
13) **POWER COMPANY d/b/a DOMINION**
14) **VIRGINIA POWER TO THE DEBTORS’**
15) **OMNIBUS RESPONSE TO OBJECTIONS**
16) **FILED BY VIRGINIA ELECTRIC AND**
17) **POWER COMPANY d/b/a DOMINION**
18) **VIRGINIA POWER [DOCKET NO. 72] AND**
19) **COLUMBIA GAS OF VIRGINIA, INC.**
20) **[DOCKET NO. 88] TO AMOUNT AND**
21) **SCOPE OF ADEQUATE ASSURANCE**
22) **THAT CERTAIN UTILITIES ARE**
23) **ENTITLED TO UNDER BANKRUPTCY**
24) **CODE SECTION 366**
25)
26) DATE: August 28, 2013
27) TIME: 10:00 a.m., pst
28) PLACE: Courtroom 1475
255 East Temple St.
Los Angeles, CA 90012

23 Virginia Electric and Power Company d/b/a Dominion Virginia Power (“Dominion”), by
24 counsel, hereby files this *Reply* to the *Debtors’ Omnibus Response To Objections Filed By*
25 *Virginia Electric and Power Company d/b/a Dominion Virginia Power [Docket No. 72] and*
26 *Columbia Gas of Virginia, Inc. [Docket No. 88] To Amount and Scope of Adequate Assurance*
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1 *That Certain Utilities Are Entitled To Under Bankruptcy Code Section 366*, (the “Response”),
2 and sets forth the following:

3 **INTRODUCTION**

4 The Debtors filing and “service” of the *Emergency Motion For Order: (I) Deeming*
5 *Utilities Adequately Assured Of Future Performance; and (II) Establishing Procedures For*
6 *Determining Requests For Additional Assurance Pursuant To Bankruptcy Code Section 366;*
7 *Memorandum of Points and Authorities In Support Thereof* (the “Utility Motion”) were in
8 violation of: (a) the express provisions of Section 366 of the Bankruptcy Code; (b) Rules 9014
9 and 7004 of the Federal Rules of Bankruptcy Procedure; and (c) Dominion’s due process rights.
10 In addition, there was no emergency that justified the filing of an emergency motion on the
11 second day of the case when Section 366(c) of the Bankruptcy Code provides the Debtors with
12 thirty days to provide their utilities with adequate assurance of payment and the Debtors only list
13 thirteen utility accounts in the Utility Motion (two electric accounts, one gas account, six phone
14 companies, one internet provider, one water and fire meter service provider, one sewer service
15 and one waste disposal company). Moreover, the Debtors did not allege or demonstrate that any
16 utility company was threatening to terminate their service because no such facts exist. By
17 asserting a false emergency on the second day of the case, the Debtors were able to improperly
18 obtain relief on an expedited basis that was in violation of Dominion’s due process rights and its
19 rights under Section 366 of the Bankruptcy Code. Dominion has promptly and timely objected
20 to the foregoing relief.
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24 With respect to Section 366(a), it provides that:

25 Except as provided in subsections (b) and (c) of this section, a utility may not alter, refuse
26 or discontinue service to, or discriminate against, the trustee or debtor **solely on the basis**
27 **of the commencement a case under this title or that a debt owed by the debtor to**
28 **such utility for service rendered before the order for relief was no paid when due.**

1 In the relief sought by the Debtors in the Utility Motion, the Debtors improperly failed to
2 include the limiting language set forth in bold and underlined above. Section 366 of the
3 Bankruptcy Code only precludes a utility from altering, refusing or discontinuing service for the
4 two specified reasons in Section 366 and not the open ended injunctive relief that the Debtors
5 improperly sought and were granted in the *Order Granting Emergency Motion For Order: (I)*
6 *Deeming Utilities Adequately Assured of Future Performance; and (II) Establishing Procedures*
7 *For Additional Assurance Pursuant To Bankruptcy Code Section 366* (the “Interim Utility
8 Order”). Specifically, the improper provision in the Utility Order is in Section 2, which
9 provides that “The Debtors’ utility service providers (the “Utilities”) are prohibited from
10 altering, refusing, discontinuing service to, or discriminating against the Debtors.” (the
11 “Injunctive Provision”). The foregoing language in the Utility Order is not in accord with
12 Section 366 because of the failure to include the limiting language of Section 366 that limits this
13 relief to actions taken by a utility against the Debtors based on the filing of the bankruptcy case
14 or collection of a prepetition debt.

17 Moreover, although the Debtors claim in the Response that Section 105 of the
18 Bankruptcy Code justifies the Injunctive Provision in the Interim Utility Order, which it does
19 not, they did not seek relief under Section 105 in the Utility Motion.

21 In order to put how improper the relief sought in the Utility Motion and contained in the
22 Interim Utility Order is, it is important to review the statutory procedure created by the plain
23 language of Section 366(c) of the Bankruptcy Code, which provides as follows:

24 A. Under Section 366(c)(2), the Debtors are to provide their utilities with adequate
25 assurance of payment that is satisfactory to the utility within thirty days of the petition date;

1 B. If the Debtors want to modify the amount of adequate assurance of payment
2 sought under Section 366(c)(2) above, they can, **“after notice and a hearing”** file a motion
3 under Section 366(c)(3)(A); and

4 C. When making a determination under Section 366(c)(3)(A), the Court is limited to
5 the forms of adequate assurance of payment in Section 366(c)(1)(A) and to the evidence it may
6 consider under Section 366(c)(3)(B).
7

8 Even assuming the Court can by-pass some of the requirements of Section 366 to
9 establish procedures to address the adequate assurance of payment determination, which
10 Dominion denies, ultimately the Court must have a legal basis for its’ actions and it should not
11 simply ignore all of the requirements of the statute. The only mechanism in Section 366 that
12 allows a debtor to seek to modify adequate assurance of payment is Section 366(c)(3). As set
13 forth above, Section 366(c)(3)(A) provides that a debtor can seek to modify the amount of a
14 utility’s adequate assurance of payment request after notice and a hearing. By proceeding on an
15 illusory emergency basis on a pleading that was purportedly served on Dominion on a Friday for
16 a hearing on the following Monday in a Court across the country, the Debtors clearly did not
17 proceed with proper “notice and a hearing” as required by Section 366(c)(3)(A).
18

19 In addition, even though Section 366(c)(3)(A) only allows a debtor to modify the amount
20 and not the form of adequate assurance of payment and Section 366(c)(1)(A) specifies the
21 acceptable forms of adequate assurance of payment, the relief granted in the Interim Utility
22 Order improperly allows the Debtors to establish the form of adequate assurance of payment that
23 is a form not authorized by the statute. Moreover, the Interim Utility Order completely reverses
24 the statutory burden by requiring the utilities, not the Debtors, to justify why the amount of
25 security selected by the Debtors needs to be modified. There is absolutely no authority for this
26 Court to switch these requirements and the burden of proof. Furthermore, the Interim Utility
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1 Order also requires the utilities to provide information on the prepetition amount alleged to be
2 due and owing from the Debtors and the amount of any prepetition security maintained by the
3 utility even though Section 366(c)(3)(B) clearly makes both of those items statutorily irrelevant.

4 With respect to the adequate assurance of payment sought by Dominion, the undisputed
5 facts demonstrate that the Debtors' highest usage months are July, August and September, which
6 are the relevant months for this case since the Debtors filed on July 10, 2013 and are seeking to
7 close on a sale of assets at the beginning of October 2013. Therefore, the monthly averages
8 relied upon by the Debtors are not relevant because they factor in amounts in months when the
9 Debtors' usage declines. Moreover, if the Debtors' usage for the post-petition portion of the
10 month of July 2013 is reflective of the projected usage for August and September, which the
11 Debtors have represented is the case, then the per diem charges for the Debtors' first post-
12 petition bill should provide a good estimate of the Debtors' expected post-petition charges from
13 Dominion. As set forth herein, Dominion's first post-petition bill for the first 22 days of this
14 case was in the amount of \$26,117.25, which results in a \$1,187.14 per diem. Based on the
15 foregoing per diem, the Debtors' projected bills for August and September 2013 should be
16 \$36,801.34 and \$35,614.20. **Therefore, the total electric charges from Dominion to the**
17 **Debtors from the Petition Date to September 30, 2013 should be approximately \$98,533.**
18 **The Debtors, however, have only budgeted \$51,095 for both of their electric providers**
19 **combined. Accordingly, if the Debtors pay Dominion's first post-petition bill in the amount**
20 **of \$26,117.25, they only have \$24,977.75 in remaining funds budgeted to pay: (a) the**
21 **projected \$72,415.54 in charges from Dominion for August and September; (b) any**
22 **additional charges from Dominion in October prior to the sale closing; and (c) any charges**
23 **from the Debtors' other electric provider. Hence, Dominion's two month deposit request**
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1 of \$63,594 is reasonable considering the Debtors' significant underfunding of utility
2 expenses.

3 In addition to completely ignoring the plain language and requirements of Section 366,
4 the Debtors also violated Dominion's due process rights in the manner in which it "served" the
5 Utility Motion and Notice of Hearing on Dominion. Even assuming the manner of service was
6 proper, which it was not, Dominion would have received the Utility Motion and Notice of
7 Hearing on Friday, July 12, 2013 for a hearing across the United States in California that was
8 scheduled for 2 p.m. on Monday, July 15, 2013. That is simply not sufficient time for Dominion
9 or any other utility to respond. Moreover, as set forth above there was no emergency that
10 justified hearing the Utility Motion on such an expedited basis and there was clearly no reason
11 why the relief granted in the Interim Utility Order should have been anything other than interim
12 relief.
13

14
15 Furthermore, Dominion is a corporation and Rules 9014 and 7004 clearly set forth how
16 the Utility Motion should have been served on Dominion and the Debtors failed to do so.
17 Therefore, for all of the foregoing reasons the Court should: (1) Grant Dominion the adequate
18 assurance of payment requested herein; and (2) Enter an Order that eliminates the Injunctive
19 Provision contained in the Utility Order.
20

21 FACTS

22 1. On July 10, 2013 (the "Petition Date"), the Debtors commenced their cases under
23 Chapter 11 of title 11 of the United States Code (the "Bankruptcy Code") that are now pending
24 with this Court. The Debtors continue to operate their businesses and manage their properties as
25 debtors in possession pursuant to Bankruptcy Code sections 1107(a) and 1108.

26 2. The Debtors' cases are being jointly administered.
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1 **A. THE UTILITY MOTION**

2 3. On July 11, 2013, the Debtors filed the Utility Motion [BR Docket No. 8.].

3 4. Also on July 11, 2013, the Debtors filed the *Omnibus Notice of Hearing For*
4 *Debtors' First Day Motions* ("Notice of Hearing) [BR Docket No. 14.], which set forth that the
5 hearing on the Utility Motion was scheduled to be heard on July 15, 2013 – the fourth day of the
6 case.

7
8 5. One of the locations that the Debtors "served" the Utility Motion and Notice of
9 Hearing was Dominion Virginia Power, P.O. Box 26019, Richmond, VA 23260-6019. The
10 foregoing address is a payment lock box that receives thousands of payments each day. *See*
11 *Declaration of Sherry R. Ward* at ¶ 16 (hereinafter the "Ward Declaration") filed
12 contemporaneously with this Reply.

13
14 6. Dominion's registered agent, which is available from the Commonwealth of
15 Virginia State Corporation Commission ("SCC") website, is CT Corporation at 4701 Cox
16 Road, Suite 301, Glen Allen, VA 23060-6802. *Ward Declaration* at ¶ 14. It is undisputed that
17 the Debtors did not serve the Utility Motion and Notice of Hearing upon Dominion's registered
18 agent.

19 7. Barbara Smith is an employee in Dominion's credit department, but she is not
20 an officer, a managing agent or an agent authorized to receive service of process for Dominion.
21 *Ward Dec.* at ¶ 15. As such, pursuant to the express requirements of Rule 7004(b)(3), the
22 Debtors failed to properly serve the Utility Motion upon Dominion.

23
24 8. Even if Dominion received the Utility Motion and Notice of Hearing that the
25 Debtors served, Dominion would not have received them until Friday, July 12, 2013.
26 Moreover, the pleadings that the Debtors sent via email to Barbara Smith at Dominion were
27 not sent until 6:18 p.m. Eastern Daylight Time on July 12, 2013.
28

1 9. Dominion was not properly served with the Utility Motion and it did not have
2 sufficient time to respond even if it received the pleadings on July 12, 2013. Furthermore,
3 because the Debtors never attempted to contact Dominion regarding its adequate assurance
4 request prior to the filing of the Utility Motion, Dominion had no opportunity to respond to the
5 Utility Motion or otherwise be heard at the *ex parte* hearing on the Utility Motion that took place
6 on Monday, July 15, 2013, despite the fact that Section 366(c)(3) (presuming this was the
7 statutory basis for the relief sought by the Debtors) requires that there be “notice and a hearing”
8 to Dominion.
9

10 10. In the Utility Motion, the Debtors sought to avoid the applicable legal standards
11 under Sections 366(c)(2) and (3) by seeking Court approval for their own form of adequate
12 assurance of payment, which is a newly-created escrow account containing \$22,595 (the “Bank
13 Account”) that is supposedly equal to two-weeks of utility charges. Utility Motion at p. 9. The
14 foregoing proposal is unacceptable to Dominion and should not be considered relevant by this
15 Court because Sections 366(c)(2) and (3) do not allow the Debtors to establish the form or
16 amount of adequate assurance of payment. Under Sections 366(c)(2) and (3), this Court and the
17 Debtors are limited to modifying, if at all, the amount of the security sought by Dominion under
18 Section 366(c)(2).
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20 11. The Debtors did not allege any evidentiary basis in the Utility Motion in support
21 of their proposed form/amount of adequate assurance of payment.
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23 12. The Utility Motion did not address why this Court should consider modifying, if
24 at all, the amount of Dominion’s adequate assurance request pursuant to Section 366(c)(2).
25

26 13. Furthermore, the Utility Motion does not address why the Bank Account would
27 be undercapitalized at a two-week deposit amount when the Debtors know that Dominion is
28 required by applicable state laws, regulations and/or tariffs to bill the Debtors monthly.

1 14. Because the Debtors filed a Motion and not an adversary proceeding, even if
2 Dominion was properly and timely served with the Utility Motion, which it was not, Dominion
3 would not have been on notice that Debtors were seeking injunctive relief prior to entry of the
4 Interim Utility Order.

5
6 **B. THE INTERIM UTILITY ORDER**

7 15. On July 18, 2013 the Court entered the Interim Utility Order.

8 16. Paragraph 2 of the Interim Utility Order provides:

9 **“2. The Debtors’ utility service providers (the “Utilities”) are prohibited**
10 **from altering, refusing, discontinuing service to, or discriminating against**
11 **the Debtors.”**

12 (the “Injunctive Provision”).

13 17. Additionally, paragraph 4 of the Interim Utility Order completely and
14 inappropriately reverses the statutory requirements of Section 366(c) of the Bankruptcy Code.

15
16 **C. THE DOMINION OBJECTION TO THE UTILITY MOTION**

17 18. The Interim Utility Order provided that any utility that wanted to object must file
18 an Objection within 14 days from entry of the Interim Utility Order, i.e. by August 1, 2013.
19 Interim Utility Order at ¶ 4.

20 19. On July 26, 2013, Dominion timely filed its *Objection* [BR Docket No. 72.] to
21 the Utility Motion.

22 20. Through the Objection, Dominion set forth the legal and factual grounds in
23 support of its request that the Court deny the Utility Motion as to Dominion and (i) order the
24 Debtors to provide Dominion with a two-month cash deposit in the amount of \$63,594 as
25 adequate assurance of payment to Dominion, and (ii) either correct the Interim Utility Order or
26 enter a Final Utility Order that tracks the express language of Section 366(a) of the Bankruptcy
27
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1 Code and not grant the Debtors' the extraordinary injunctive relief contained in the Interim
2 Utility Order. Dominion incorporates herein the *Objection* in its entirety.

3 **D. THE PARTIES' ATTEMPTS TO RESOLVE DOMINION'S ADEQUATE**
4 **ASSURANCE OF PAYMENT REQUEST AND OBJECTION TO THE**
5 **INJUNCTIVE PROVISION.**

6 21. On July 29, 2013, Dominion's counsel sent a letter to Debtors' counsel in an
7 attempt to resolve Dominion's adequate assurance of payment request and its objection to
8 inclusion of the Injunctive Provision in the Interim Utility Order. Despite several
9 communications, the parties were unable to reach an agreement.

10 22. Dominion provides electric utility service to one account that Debtor Transprint
11 USA, Inc. (hereinafter the "Debtor") has with Dominion in the Commonwealth of Virginia.
12 Ward Dec. at ¶ 3.

13 23. The parties were not able to agree on a cash deposit amount that the Debtor
14 would provide to Dominion because the Debtor was focused on the average monthly charges
15 and Dominion was focused on the actual usage in the first post-petition bill and historical usage
16 numbers for the upcoming months of August and September.

17 24. In addition, the parties failed to reach an agreement regarding the removal of the
18 Injunctive Provision. Although Dominion recognizes that settlement negotiations are not
19 admissible, in order to resolve the dispute concerning the Injunctive Provision, Dominion
20 offered to provide Debtors' counsel with copies of the default and a termination notice that
21 would be sent to the Debtors prior to termination of service for non-payment of post-petition
22 charges. Dominion remains willing to provide Debtors' counsel with such notice if the
23 Injunctive Provision is removed in the Final Utility Order.

24 **E. DOMINION'S PROVISION OF ELECTRIC UTILITY GOODS/SERVICES TO**
25 **THE DEBTORS.**

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1 25. Dominion provided the Debtor with prepetition utility goods and/or services and
2 has continued to provide the Debtor with utility goods and/or services since the Petition Date.
3 Ward Dec. at ¶ 3.

4 26. Dominion is a regulated public utility that is subject to the jurisdiction of the
5 Commonwealth of Virginia State Corporation Commission (“SCC”). Dominion provides
6 electricity to customers in the Commonwealth of Virginia, including the Debtor, pursuant to
7 Terms And Conditions that are on file with the SCC (the “Terms And Conditions”). Ward
8 Dec. at ¶ 4.

9 27. Section IX of Dominion’s Terms And Conditions provides that deposits for
10 electric supply and electric delivery service shall not exceed the customer’s estimated liability
11 for two months’ usage. Ward Dec. at ¶ 5. A true and accurate copy of Section IX of
12 Dominion’s Terms And Conditions is attached to the Ward Dec. as **Exhibit 1**.

13 28. In its Objection to the Utility Motion, Dominion requested a two-month cash
14 deposit in the amount of \$63,594 from the Debtor as adequate assurance of payment pursuant
15 to Section 366(c) of the Bankruptcy Code. The \$63,594 deposit requested by Dominion in its
16 Objection was the amount of the Debtor’s two highest consecutive months during the twelve
17 month period prior to the July 10, 2013 petition date (the “Petition Date”), which is an amount
18 Dominion is entitled to request pursuant to Section IX of the Terms And Conditions. Ward
19 Dec. at ¶ 6.

20 29. On August 2, 2013, Dominion issued a bill in the amount of \$26,117.25 to the
21 Debtor for post-petition utility charges incurred by the Debtor from the Petition Date to August
22 1, 2013, a period of 22 days (the “August 2 Bill”). The per diem charges for the August 2,
23 2013 Bill are \$1,187.14 (\$22,117.25/22). Ward Dec. at ¶ 7. A redacted copy of the August 2
24 Bill is attached to the Ward Dec. as **Exhibit 2**.

1 30. The due date for the August 2 Bill is August 27, 2013. As of the date of this
2 Declaration, Dominion has not received payment from the Debtor for the August 2 Bill. Ward
3 Dec. at ¶ 8.

4 31. In the normal course of its business and pursuant to billing guidelines contained
5 in the Terms And Conditions and applicable Virginia law, Dominion will issue a bill to the
6 Debtor for charges incurred by the Debtor from August 1, 2013 to the day before the next bill
7 date on or about September 3, 2013. If the per diem charges for the Debtors' August 1 to
8 August 31, 2013 and September 1 to September 30, 2013 bills are the same as the per diem
9 charges that are contained in the August 2 Bill, the projected bills would be as follows:
10

- 11 A. August 2013 charges - \$36,801.34 (\$1,187.14 x. 31); and
12 B. September 2013 charges - \$35,614.20 (\$1,187.14 x 30).

13
14 Ward Dec. at ¶ 9.

15 32. Based the actual amount of the August 2 Bill and projections for estimated
16 August and September charges, the total post-petition utility expenses that the Debtor could
17 incur from Dominion are as follows:

- 18 A. \$26,117.25 – August 2 Bill
19 B. \$36,801.34 – Projected August usage
20 C. \$35,614.20 – Projected September usage
21 D. \$98,532.79 – Projected total utility expenses of the Debtors to Dominion
22

23 from the Petition Date to September 30, 2013.

24 Ward Dec. at ¶ 10.

25 33. The amount of the Debtor's bills from Dominion for July, August, September
26 2012 were as follows:

- 27 A. August 2, 2012 bill for July 2012 charges – \$41,365.46;
28

1 B. September 4, 2012 bill for August 2012 charges - \$33,601.11; and

2 C. October 2, 2012 bill for September 2012 charges – \$30,747.85

3 Ward Dec. at ¶ 11.

4 34. Section XII of Dominion’s Terms And Conditions, a true and accurate copy of
5 which is attached to the Ward Dec. as **Exhibit 3**, provides, in pertinent part:

6 A. Bills are due and payable upon presentation and become past due on the
7 next bill date; and

8 B. A late payment charge will be imposed on the next bill date if the prior
9 month’s charges are not paid.

10 Ward Dec. at ¶ 12.

11 35. If a customer does not pay a bill when due, a termination of service notice will
12 be included with the next month’s bill that is mailed to the customer. Pursuant to Section XVI
13 (B) of the Terms and Conditions, Dominion can terminate service to a customer for
14 nonpayment of a past due bill after providing the customer with ten business days’ notice to
15 cure the default. Ward Dec. at ¶ 13. A true and accurate copy of Section XVI of the Terms
16 and Conditions is attached to the Ward Dec. as **Exhibit 4**.

17 36. Accordingly, under Dominion’s billing cycle, the Debtor could receive more
18 than two months of unpaid charges before Dominion could cease the supply of goods and/or
19 services for the post-petition payment default.

20 **F. DEBTORS’ RESPONSE TO DOMINION’S OBJECTION TO THE UTILITY**
21 **MOTION.**

22 37. The Debtors’ Response was filed on August 22, 2013.

23 38. In Exhibit A to the *Declaration Of Robert D. Katz In Support of the Response*
24 (the “Katz Declaration”), the Debtors state that they have budgeted the following amounts for
25 both of their electric providers:
26
27
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1 Ward Dec., the Debtor's projected monthly post-petition utility charges from Dominion for
2 August and September 2013 usage would be \$36,801.34 and \$35,614.20, respectively.
3 Moreover, the Debtors' first post-petition bill from Dominion for 22 days of charges in the
4 amount of \$26,117.25 surpasses the inadequate amount that the Debtors propose to provide all of
5 their utilities as adequate assurance of payment.
6

7 Furthermore, this Court should not even consider the Bank Account as a form of adequate
8 assurance of payment because: (1) It is not relevant because Section 366(c)(3) provides that a
9 debtor can only modify "the amount of an assurance of payment under paragraph (2)"; and (2)
10 The Bank Account is not a form of adequate assurance of payment recognized by Section
11 366(c)(1)(A). Although the cases cited by the Debtors in the Utility Motion and Debtors'
12 Response approved a bank account as adequate assurance, they only did so by improperly
13 ignoring the plain language of Section 366(c)(3) and Section 366(1)(A). With respect to the
14 *Great Atl. & Pac. Tea. Co.* case cited in the Debtors' Response, only the Utilities that did not
15 object to the debtors' proposed form of adequate assurance of payment in that case received
16 adequate assurance in the form of an escrow account. Moreover, even if the Court were to
17 consider the Bank Account, the Bank Account is an improper and otherwise unreliable form of
18 adequate assurance of future payment for the following reasons:
19

- 20
- 21 i. All of the Debtors' utilities would supposedly have access to the inadequately
22 funded Bank Account in the event of non-payment of post-petition utility charges;
 - 23 ii. The Debtors do not propose a limitation as to the amount of money a utility can
24 obtain from the Bank Account. As such, the Bank Account could be depleted by
25 the Debtors' utilities other than Dominion.
 - 26 iii. It is underfunded from the outset because Dominion and the other utilities issue
27 monthly bills;
 - 28 iv. The Debtors do not propose any procedures concerning access to the Bank
Account;

- 1 v. The Debtors are not required to replenish the Bank Account following pay-outs;
2 and
3 vi. The Bank Account may not remain if the Debtors default on their post-petition
4 financing.

5 Accordingly, the Court should not approve the Bank Account as adequate assurance to Dominion
6 because the Bank Account is: (a) not the **form** of adequate assurance requested by Dominion; (b)
7 not a form recognized by Section 366(c)(1)(A); and (c) an otherwise unreliable form of adequate
8 assurance.

9 **B. The Debtor Should Be Required To Provide Dominion With The Adequate**
10 **Assurance Of Payment Requested Herein.**

11 Section 366(c) was amended to overturn decisions such as *Virginia Electric and Power*
12 *Company v. Caldor, Inc.*, 117 F.3d 646 (2d Cir. 1997), that held that an administrative expense,
13 without more, could constitute adequate assurance of payment in certain cases. Section
14 366(c)(1)(A) specifically defines the forms that assurance of payment may take as follows:

- 15 (i) a cash deposit;
16 (ii) a letter of credit;
17 (iii) a certificate of deposit;
18 (iv) a surety bond;
19 (v) a prepayment of utility consumption; or
20 (vi) another form of security that is mutually agreed upon between the utility and
the debtor or the trustee.

21 Section 366 of the Bankruptcy Code was enacted to balance a debtor's need for utility services
22 from a provider that holds a monopoly on such services, with the need of the utility to ensure for
23 itself and its rate payers that it receives payment for providing these essential services. *See In re*
24 *Hanratty*, 907 F.2d 1418, 1424 (3d Cir. 1990). The deposit or other security "should bear a
25 reasonable relationship to expected or anticipated utility consumption by a debtor." *In re*
26 *Coastal Dry Dock & Repair Corp.*, 62 B.R. 879, 883 (Bankr. E.D.N.Y. 1986). In this case,
27 Dominion issued a post-petition bill for the Debtor's first 22 days of usage, which was in the
28

1 amount of \$26,117.25 (defined herein as the August 2 Bill). Based on the Debtor's historical
2 usage patterns, the highest usage months are July, August and September. Debtor's counsel has
3 indicated that the post-petition July usage should be reflective of the Debtor's usage for August
4 and September 2013. Accordingly, as set forth in the Ward Declaration, the Debtor's post-
5 petition actual and projected usage through September 30, 2013 is as follows:

- 6 A. \$26,117.25 – August 2 Bill
- 7 B. \$36,801.34 – Projected August usage
- 8 C. \$35,614.20 – Projected September usage
- 9 D. \$98,532.79 – Projected total utility expenses of the Debtors to Dominion

10 from the Petition Date to September 30, 2013.

11
12 According to Exhibit A of the Katz Declaration, however, the Debtors have only
13 budgeted \$51,095 for post-petition utility expenses for both of their electric providers. Hence,
14 after the Debtors' pay Dominion's first post-petition bill, the Debtors only have \$24,977.75
15 remaining in their budget to pay: (1) \$72,415.54 in additional projected utility charges from
16 Dominion for August and September 2013; (2) Any additional amounts for Dominion charges
17 incurred in October 2013 prior to the closing of the sale of assets; and (3) Any post-petition
18 charges from their other electric utility provider. Therefore, Dominion's two month deposit
19 request of \$63,594 is reasonable and should be granted by this Court.
20

21
22 **C. The Interim Utility Order Was Entered Without Providing Dominion With
23 Notice and An Opportunity to Be Heard.**

24 The relief sought by the Debtors in the Utility Motion was based on Section 366(c) of the
25 Bankruptcy Code, which specifically requires that it be set after notice and a hearing. Rule 9014
26 of the Federal Rules of Bankruptcy Procedure provides that "reasonable notice and opportunity
27 for hearing shall be afforded the party against whom relief is sought." The Debtors allege to
28 have served, via express United States mail, the Utility Motion and Notice of Hearing on a

1 payment lock box, to a post office box to the attention of Barbara Smith and via email to Ms.
2 Smith. Even if Ms. Smith received the pleadings on Friday, July 12, 2013 as the Debtors' allege,
3 that clearly did not provide Dominion with reasonable notice and an opportunity to be heard at
4 the 2 p.m. hearing on Monday, July 15, 2013 in California.

5 Moreover, Ms. Smith, who works in Dominion's credit department, is not an officer,
6 managing or general agent authorized to receive service of the Utility Motion on behalf of
7 Dominion. As such, pursuant to the express requirements of Rule 7004(b)(3), Debtors failed to
8 properly serve the Utility Motion upon Dominion.
9

10 In support of their position, the Debtors make the baseless contention that service of the
11 Utility Motion and Notice of Hearing upon a P.O. Box is proper because that is an address on a
12 Dominion website. However, it is undisputed that the Debtors: (1) failed to perform proper due
13 diligence and obtain information on Dominion's registered agent from the Commonwealth of
14 Virginia State Corporation Commission website; and (2) allegedly had the pleadings delivered
15 on Friday, July 12, 2013 for a hearing across the country on Monday, July 15, 2013. Therefore,
16 because Dominion was not provided with proper notice and an opportunity to be heard on the
17 Utility Motion, Dominion was unable participate in the expedited hearing on the Utility Motion
18 that took place on the fifth day of the case and just four days after the Utility Motion was filed.
19 As such, the Court should vacate the Interim Utility Order as to Dominion.
20
21

22 **D. Section 362 of the Bankruptcy Code Does Not Prevent a Utility From**
23 **Terminating Service For a Post-Petition Payment Default.**

24 In an effort to implicate the automatic stay provision of Section 362(a)(3) of the
25 Bankruptcy Code, the Debtors contend that the Injunctive Provision is proper because it enjoins
26 the Debtors' utilities, including Dominion, from supposedly exercising control over the property
27 of the Debtors' estates by prohibiting utilities from terminating post-petition utility service for
28 non-payment without first seeking relief from the Court. Regarding the Debtors' argument that a

1 utility's termination of post-petition utility service for non-payment would be an act to seize
2 property of the estate in violation of Section 362, this argument was specifically rejected by the
3 court in *In re Weisel*, 428 B.R. 185, 189 (W.D. Pa 2010). Moreover, every court that has
4 addressed whether Section 362 applies to a utility's post-petition termination of service for a
5 post-petition payment default, including the *Weisel* decision cited above, have held that Section
6 362 does not apply to a utility's post-petition termination of service for a payment default. *See*
7 *In re Jones*, 369 B.R. 745, 751-52 (1st Cir. BAP 2007); *In the Matter of Deiter*, 33 B.R. 547, 548
8 (Bankr. W.D. Wis. 1983). Therefore, Section 362(a) does not prohibit Dominion from
9 exercising its state law right to terminate post-petition utility service to the Debtors for a post-
10 petition payment default or for any other reason authorized by applicable state-law.
11

12 Section 362(a) also does not provide the Court with authority to include the Injunctive
13 Provision in the Interim Utility Order or in a Final Utility Order that would (i) prohibit Dominion
14 from altering, refusing or discontinuing service to the Debtor for a post-petition payment default
15 or for any other reason permitted pursuant to Appellant's state law tariffs, and (ii) require
16 Dominion to obtain relief from the Court prior to terminating post-petition utility service to the
17 Debtor for non-payment of post-petition charges. Therefore, because the Court has no legal or
18 factual basis to include the Injunctive Provision in the Interim Utility Order or in any Final
19 Utility Order, the Court should either correct the Interim Utility Order or enter a Final Utility
20 Order that tracks the express language of Section 366(a) of the Bankruptcy Code and not grant
21 the Debtors' the extraordinary injunctive relief that they sought in the Utility Motion and which
22 is set forth in the Interim Utility Order.
23
24

25 **E. Section 105(a) Does Not Provide the Court With the Power To Include the**
26 **Injunctive Provision In a Utility Order.**

27 “[W]hatever equitable powers remain in the bankruptcy courts must and can only be
28 exercised within the confines of the Bankruptcy Code.” *Norwest Bank Worthington v. Ahlers*,

1 485 U.S. 197, 207, 108 S.Ct. 963, 969 (1988). Moreover, “it is generally agreed that Section
2 105 is not a roving commission to do equity or to do anything inconsistent with the Bankruptcy
3 Code.” *In re Yadidi*, 274 B.R. 843, 848 (9th Cir. BAP 2002). Simply put, Section 105(a) does
4 not empower the Court to enjoin actions without authority from the Bankruptcy Code. *See*
5 *Norwest Bank Worthington v. Ahlers*, 485 U.S. 197, 207, 108 S.Ct. 963, 969 (1988)
6 (“[W]hatever equitable powers remain in the bankruptcy courts must and can only be exercised
7 within the confines of the Bankruptcy Code.”); *In re Yadidi*, 274 B.R. 843, 848 (9th Cir. BAP
8 2002); *GMAC Mortgage Corp. v. Salisbury (In re Loloee)*, 241 B.R. 655, 660 (9th Cir. BAP
9 1999), *citing Bear v. Coben (In re Golden Plan)*, 829 F.2d 705, 711-12 (9th Cir. 1986).

11 The cases relied upon in the Debtors’ Response do not support the Debtors’ position in
12 this case. In fact, the *In re Canter*, 299 F.3d 1150 (9th Cir. 2002) decision actually supports
13 Dominion’s position in this case that Section 105 cannot be used in derivation of other
14 applicable rules or statutes. Specifically, in *In re Canter*, the Ninth Circuit held:

16 Federal Rule of Civil Procedure 65(a)(1) authorized the issuance of an
17 injunction upon notice to the adverse party. Although the district
18 court had the power under § 105 to issue an injunction against
19 enforcement of the municipal court judgment, it abused its discretion
20 when it withdrew the reference to bankruptcy court without cause, and
21 imposed an injunction without regard to the requirements of Rule
22 65(a)(1).

23 *In re Canter*, 299 F.3d at 1155. Similar to the district court in *Canter*, the Court entered the
24 Injunctive Provision in the Interim Utility Order “without regard to the requirements” of Rule
25 7001 of the Federal Rules of Bankruptcy Procedure, which requires that all proceedings
26 seeking injunctive or other equitable relief to be brought as an adversary proceeding.

27 In addition, the other cases cited by the Debtors are distinguishable because:
28

1 a. Debtors' reliance upon *In re Family Health Servs.*, 105 B.R. 937 (Bankr. C.D.
2 Cal. 1989) is misplaced because that case concerned an adversary proceeding seeking
3 injunctive relief.

4 b. *In the Matter of R. S. Pinellas Motel P'ship*, 2 B.R. 113 (Bankr. M.D. Fla. 1979)
5 concerned court enforcement of the automatic stay provisions of Section 362, not independent
6 injunctive relief.

7 c. The court in *In re American Hardwoods* held that the district court did not err in
8 concluding that it lacked power to enjoin a party from enforcing its state court judgment, and
9 stated, "[w]hile endowing the court with general equitable powers, section 105 does not
10 authorize relief inconsistent with more specific law." *In re American Hardwoods*, 885 F.2d
11 621, 625 (9th Cir. 1989), *citing In re Golden Plan of California, Inc.*, 829 F.2d 705, 713 (9th
12 Cir. 1986) ("a bankruptcy court's equitable powers must be strictly confined within the
13 prescribed limits of the Bankruptcy Act.").

14
15
16 Finally, the Debtors did not seek relief under Section 105(a) in the Utility Motion and
17 the Court did not reference Section 105(a) for its inclusion of the Injunctive Provision in the
18 Interim Utility Order. Simply put, Section 105(a) does not empower the Court to enjoin actions
19 without authority from the Bankruptcy Code, and as such, Section 105(a) does not provide the
20 Court with the independent equitable power to include the Injunctive Provision in the Interim
21 Utility Order or in a Final Utility Order. Therefore, the Court should either correct the Interim
22 Utility Order or enter a Final Utility Order that tracks the express language of Section 366(a) of
23 the Bankruptcy Code and not grant the Debtors' the extraordinary injunctive relief that they
24 sought in the Utility Motion and which is set forth in the Interim Utility Order.
25

26 **F. Section 366 of the Bankruptcy Code Does Not Provide the Court With the**
27 **Authority to Include the Injunctive Provision In the Interim Utility Order**
28 **or In a Final Utility Order.**

1 The Debtors agree that “Section 366 says nothing of a utility’s right to discontinue
2 service for non-payment of a postpetition debt, or for any reason.” Debtors’ Response at p. 17.
3 “The restriction on termination in section 366(a) bars only those terminations which issue
4 ‘solely on the basis’ that a debt incurred *prior* to the bankruptcy order, was not paid when due.
5 Thus, by implication, termination for failure to pay post-petition bills would not seem to be
6 barred by section 366(a).” *In re Begley*, 760 F.2d 46, 49 (3d Cir. 1985) (emphasis in original);
7 *see also In re Robinson v. Michigan Consolidated Gas Co., Inc.*, 918 F.2d 579, 588 (6th Cir.
8 1990) (holding that “it is well established that section 366(b) does not, by itself, bar a utility
9 from terminating service to a debtor or trustee who has posted adequate assurance but fails to
10 make a post-petition payment,” but noting that state laws and procedures for terminating
11 service still apply and may limit or bar the utility’s ability to do). Accordingly, Section 366
12 neither addresses nor authorizes inclusion of the Injunctive Provision in the Interim Utility
13 Order or in a Final Utility Order.
14
15

16 **G. The Injunctive Provision In the Interim Utility Order Should Be Removed**
17 **and Any Final Utility Order Should Not Contain the Injunctive Provision**
18 **Because the Debtors Did Not Seek Injunctive Relief Through the Filing of**
19 **An Adversary Proceeding.**

20 Rule 7001 of the Federal Rules of Bankruptcy Procedure in part provides:

21 An adversary proceeding is governed by the rules of this Part VII. The
22 following are adversary proceedings:

23 * * *

24 (7) a proceeding to obtain an injunction or other equitable relief, except when a
25 chapter 9, chapter 11, chapter 12, or chapter 13 plan provides for the relief;

26 * * *

27 “A motion procedure cannot be used to circumvent the requirement of an adversary
28 proceeding.” *GMAC Mortgage Corp. v. Salisbury (In re Loloee)*, 241 B.R. 655, 660 (9th Cir.
BAP 1999), *citing Bear v. Coben (In re Golden Plan)*, 829 F.2d 705, 711-12 (9th Cir. 1986). *In*

1 *re Loloee* the Ninth Circuit BAP held that due process was denied when a lien priority dispute
2 was resolved in a sale motion without an adversary proceeding when Rule 7001(2) of the
3 Federal Rules of Bankruptcy Procedure expressly requires an adversary proceeding to resolve a
4 lien priority dispute. *Id.*, 241 B.R. at 657. The Ninth Circuit BAP in *In re Loloee* also held
5 that the sale order was void because of the lack of due process. In support of its ruling, the
6 Ninth Circuit BAP stated:

8 GMAC had no reason to suspect that lien priorities would be
9 determined as part of the motion to sell property free and clear of
10 liens. It was entitled to expect that the court would apply the pertinent
11 rules of procedure.

11 *Id.*, 241 B.R. at 662.

12 Rule 7001 requires that all proceedings seeking to obtain injunctive or other equitable
13 relief shall be brought as an adversary proceeding. *In re Best Products*, 203 B.R. 51 (Bankr.
14 E.D. Va. 1996). In *Best Products*, the bankruptcy court, in the context of a chapter 11
15 bankruptcy case, held:

17 The final issue which the court must address is the status of the injunction
18 included in my September 24, 1996, order providing adequate assurance to
19 utility companies. Fed.R.Bankr.P. 7001(7) plainly requires that any request for
20 an injunction or other equitable relief must be sought in the context of an
21 adversary proceeding. Since the debtor has not filed the requisite action, I
22 cannot enjoin any utility from pursuing its rights under state law should the
23 debtor default in its payments post-petition.

21 *In re Best Products*, 203 B.R. at 54.

22 Despite legal authority to the contrary, the Debtors incorrectly claim that they did not
23 need to bring an adversary proceeding in order for the Court to enter the Interim Utility Order
24 that included the Injunctive Provision that prohibits Dominion from exercising its state law right
25 to terminate post-petition utility service to the Debtors for a post-petition payment default or for
26 any other reason authorized by Dominion's state-law tariffs. The Debtors also incorrectly claim
27 that the Injunctive Provision did not require the filing of an adversary proceeding because "[t]he
28

1 statutory injunction imposed by section 362 of the Bankruptcy Code is automatic, and does not
2 require any proceeding to be effective.” Debtors’ Response at p. 21. As discussed in Section D
3 above, Section 362 does not prohibit a utility from terminating service for a post-petition
4 payment default or for any other reason permitted pursuant to Dominion’s state law tariffs, such
5 as the termination of service for safety reasons, and the Debtors have not cited to any legal
6 authority to the contrary. As such, the Court should either correct the Interim Utility Order or
7 enter a Final Utility Order that tracks the express language of Section 366(a) of the Bankruptcy
8 Code and not grant the Debtors’ the extraordinary injunctive relief that they sought in the Utility
9 Motion and which is set forth in the Interim Utility Order.
10

11 WHEREFORE, Dominion respectfully requests that this Court enter an order:

- 12 1. Denying the Utility Motion as to Dominion;
- 13 2. Awarding Dominion the post-petition adequate assurance of payment pursuant to
14 Section 366 in the amount and form satisfactory to Dominion;
- 15 3. Eliminating the injunctive relief in the Interim Utility Order and entering a Final
16 Utility Order that tracks the language of Section 366; and
17
- 18 4. Providing such other and further relief as the Court deems just and appropriate.
19

20 DATED: August 26, 2013

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/s/ David W. Meadows

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*Counsel for Virginia Electric and Power Company
d/b/a Dominion Virginia Power*

1 **PROOF OF SERVICE OF DOCUMENT**

2 I am over the age of 18 and not a party to this bankruptcy case or adversary proceeding. My business
3 address is: 1801 Century Park East, Suite 1235, Los Angeles, CA 90067

4 A true and correct copy of the foregoing document entitled (*specify*): **REPLY OF VIRGINIA ELECTRIC
5 AND POWER COMPANY d/b/a DOMINION VIRGINIA POWER TO THE DEBTORS' OMNIBUS
6 RESPONSE TO OBJECTIONS FILED BY VIRGINIA ELECTRIC AND POWER COMPANY d/b/a
7 DOMINION VIRGINIA POWER [DOCKET NO. 72] AND COLUMBIA GAS OF VIRGINIA, INC.
8 [DOCKET NO. 88] TO AMOUNT AND SCOPE OF ADEQUATE ASSURANCE THAT CERTAIN
9 UTILITIES ARE ENTITLED TO UNDER BANKRUPTCY CODE SECTION 366**

10 will be served or was served (a) on the judge in chambers in the form and manner required by LBR
11 5005-2(d); and (b) in the manner stated below:

12 **1. TO BE SERVED BY THE COURT VIA NOTICE OF ELECTRONIC FILING (NEF):** Pursuant to
13 controlling General Orders and LBR, the foregoing document will be served by the court via NEF and
14 hyperlink to the document. On (*date*) 8/26/13, I checked the CM/ECF docket for this bankruptcy case or
15 adversary proceeding and determined that the following persons are on the Electronic Mail Notice List
16 to receive NEF transmission at the email addresses stated below:

17 Service information continued

18 on attached page

19 **2. SERVED BY UNITED STATES MAIL:**

20 On (*date*) _____, I served the following persons and/or entities at the last known addresses
21 in this bankruptcy case or adversary proceeding by placing a true and correct copy thereof in a sealed
22 envelope in the United States mail, first class, postage prepaid, and addressed as follows. Listing the
23 judge here constitutes a declaration that mailing to the judge will be completed no later than 24 hours
24 after the document is filed.

25 Service information continued

26 on attached page

27 **3. SERVED BY PERSONAL DELIVERY, OVERNIGHT MAIL, FACSIMILE TRANSMISSION OR
28 EMAIL (state method for each person or entity served):** Pursuant to F.R.Civ.P. 5 and/or controlling

LBR, on (*date*) 8/26/13, I served the following persons and/or entities by personal delivery, overnight
mail service, or (for those who consented in writing to such service method), by facsimile transmission
and/or email as follows. Listing the judge here constitutes a declaration that personal delivery on, or
overnight mail to, the judge will be completed no later than 24 hours after the document is filed.

Hon. Sheri Bluebond (via messenger)

Service information continued

on attached page

1 I declare under penalty of perjury under the laws of the United States that the foregoing is true and
correct.

2 8/26/13 David W. Meadows /s/ David W. Meadows
3 Date Printed Name Signature

4 I. Continued:

- 5
- 6 • Brian L Davidoff bdavidoff@greenbergglusker.com,
jreinglass@greenbergglusker.com;kwoodson@greenbergglusker.com;calendar@greenb
- 7 ergglusker.com;sgaeta@greenbergglusker.com
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dprim@whdlaw.com;tmichalak@whdlaw.com
- 9 • Ron Maroko ron.maroko@usdoj.gov
- 10 • David W. Meadows david@davidwmeadowslaw.com
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- 12 • Margreta M Morgulas mmorgulas@stutman.com
- 13 • Michael S Neumeister mneumeister@stutman.com
- 14 • Frank T Pepler frank.pepler@dlapiper.com
- 15 • Danielle A Pham dpham@stutman.com, daniellepham@gmail.com
- 16 • Jeffrey M. Reisner jreisner@irell.com
- 17 • Christopher O Rivas crivas@reedsmith.com
- 18 • Nicola G Suglia nsuglia@fleischerlaw.com
- 19 • United States Trustee (LA) ustpreion16.la.ecf@usdoj.gov
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